

MAY 14, 2008

**STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES**

In the Matter of)	Case No. 06-O-12424-RAH (06-O-12591;
)	06-O-12711; 06-O-13267;
JAMES R. MILLER,)	06-O-13991)
)	
Member No. 198567,)	DECISION AND ORDER OF
)	INVOLUNTARY INACTIVE
<u>A Member of the State Bar.</u>)	ENROLLMENT

I. Introduction

In this default matter, respondent **JAMES R. MILLER** (respondent) is charged with eighteen counts of professional misconduct. The charged misconduct includes, among other things, allegations that respondent: (1) failed to perform legal services with competence; (2) failed to promptly respond to client inquiries; (3) misappropriated client funds; (4) knowingly engaged in the unauthorized practice of law; (5) misused his client trust account; (6) made misrepresentations to the San Diego Superior Court; and (7) failed to cooperate in a disciplinary investigation. The court finds, by clear and convincing evidence, that respondent is culpable of the alleged acts of misconduct.

In view of respondent's extensive misconduct and the evidence in aggravation, the court recommends that respondent be disbarred.

II. Pertinent Procedural History¹

On October 15, 2007, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing and properly serving on respondent, at his official

¹Pursuant to Evidence Code section 452, subdivision (d), the court takes judicial notice of its court records.

membership records address (official address),² a notice of disciplinary charges (NDC). The State Bar also served two additional copies of the NDC by certified mail, return receipt requested, addressed to respondent at the following alternative addresses: (1) P.O. Box 5515, San Jose, CA 95150 (San Jose address)³; and (2) 10601-G Tierrasanta Boulevard, San Diego, CA 92124.⁴

In addition to mailing the NDC, an investigator for the State Bar personally served respondent with a copy of the NDC on November 9, 2007. During this meeting, the State Bar investigator asked respondent to provide her with his current mailing address. Respondent refused to provide her with an address.

On November 14, 2007, the State Bar filed a motion for entry of respondent's default (default motion) due to his failure to file a response to the NDC, as required by rule 103 of the Rules of Procedure of the State Bar of California (Rules of Procedure).⁵ A copy of said motion was properly served on respondent that same day by certified mail, return receipt requested, addressed to respondent at his official address. Also on that same day, courtesy copies of this motion were also sent to respondent by certified mail, return receipt requested, at his San Jose and Tierrasanta addresses.

On November 28, 2007, the court held an in-person status conference in this matter. Both the State Bar and respondent were present. At this status conference, the court advised respondent

²The court takes judicial notice of the State Bar's official membership records pursuant to Evidence Code section 452, subdivision (h), which reflect that effective November 11, 2003, respondent's official address has been and remains 525 B St., #1500, San Diego, CA 92101.

³As noted below, respondent provided the State Bar with the San Jose address on March 7, 2007.

⁴ This is an alternate address that respondent gave to the State Bar. However, all references to this address within the NDC also include an apartment/suite number. Therefore, all future references to "Tierrasanta address" refer to: 10601-G Tierrasanta Boulevard, #163, San Diego, CA 92124.

⁵The file stamp indicates that the default motion was filed on November 13, 2007. However, the court finds, based on the supporting declarations contained within the default motion, that said motion was actually filed on November 14, 2007.

that he had until December 10, 2007 to respond to the NDC; otherwise, the court would consider granting the State Bar's default motion.

On December 10, 2007, respondent filed a response to the NDC. Said response, however, was improperly filed, in that it did not contain respondent's original signature. Therefore, on December 20, 2007, the court issued an order rescinding the filing of respondent's response to the NDC. The court further ordered that respondent file a properly executed original copy of his response with the court by January 7, 2008. A copy of said order was properly served on respondent by first-class mail, postage fully prepaid, on December 20, 2007, addressed to respondent at his official address. That same day, courtesy copies of this order were sent to respondent at his San Jose and Tierrasanta addresses. Two of the three copies of said order were subsequently returned to the State Bar Court by the U.S. Postal Service as undeliverable. The third copy, which was sent to respondent's Tierrasanta address, was not returned to the State Bar Court as undeliverable or for any other reason.

By January 10, 2008, respondent had neither properly filed a response to the NDC, nor filed a response to the State Bar's motion for entry of his default. Consequently, on January 10, 2008, the court filed an Order of Entry of Default (Rule 200 - Failure to File Timely Response), Order Enrolling Inactive and Further Orders. The order advised that no default hearing would be held unless one was requested by the State Bar. The order also permitted the State Bar to file any further declarations, exhibits, or legal argument regarding the level of discipline by no later than January 28, 2008. A copy of said order was properly served on respondent on January 10, 2008, by certified mail, return receipt requested, addressed to respondent at his official address. That same day, courtesy copies of this order were sent to respondent at his San Jose and Tierrasanta addresses. All three copies of said order were subsequently returned to the State Bar Court by the U.S. Postal Service as undeliverable.

Respondent never filed a proper response to the NDC. (Rules Proc. of State Bar, rule 103.) The court originally took this matter under submission on January 28, 2008, following the filing of

the State Bar's brief on culpability and discipline.⁶ However, the NDC and the State Bar's brief on culpability and discipline contained an ambiguity. Therefore, the court vacated the submission date and held a status conference to clarify this ambiguity. Following this status conference, the court took this matter under submission on April 29, 2008.

III. Findings of Fact and Conclusions of Law

The court's findings are based on the allegations contained in the NDC as they are deemed admitted and no further proof is required to establish the truth of those allegations. (Business and Professions Code section 6088⁷; Rules Proc. of State Bar, rule 200(d)(1)(A).) The findings are also based on any evidence admitted.

It is the prosecution's burden to establish culpability of the charges by clear and convincing evidence. (*In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 171.)

A. Jurisdiction

Respondent was admitted to the practice of law in California on December 6, 1998, and has been a member of the State Bar since that time.

B. Misconduct Involving Respondent's Client Trust Account

1. Count One: Misuse of Client Trust Account (*Rules Prof. Conduct, Rule 4-100(A)*)⁸

a. Facts

Between January 2006 and June 2006, respondent maintained a client trust account at California Bank and Trust designated as account number 20-500631-11 (CTA). Between March 13, 2006 and March 24, 2006, respondent issued a total of eight paper and electronic checks to the following companies: The UPS Store, Capital One, SBC, Office Depot, and USAA.⁹ Each of these

⁶The State Bar did not request a default hearing.

⁷All references to section(s) are to the Business and Professions Code, unless otherwise stated.

⁸ All references to rule(s) are to the current Rules of Professional Conduct of the State Bar of California, unless otherwise stated.

⁹ The total sum of these checks was \$4692.99.

checks was drawn on respondent's CTA and was used to pay his personal and business expenses.

b. Conclusions of Law

Rule 4-100(A) provides that all funds received for the benefit of clients must be deposited in a client trust account and that no funds belonging to the attorney shall be deposited therein or otherwise commingled therewith. It further provides that in the case of funds belonging in part to a client and in part presently or potentially to the member or the law firm, the portion belonging to the member or law firm must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed.

By issuing paper and electronic checks from his CTA to pay personal and business expenses on eight separate occasions between March 13, 2006 and March 24, 2006, respondent misused his client trust account, in willful violation of rule 4-100(A).

2. Counts Two & Three: Failing to Maintain Client Funds in Trust (*Rule 4-100(A)*) and Misappropriation (*Section 6106*)

a. Facts

On March 7, 2006, National Union Fire Insurance Company of Pittsburgh (National Union) issued a check in the amount of \$54,896.27 payable to respondent on behalf of his client, Leo Lopez (Lopez) for settlement of Lopez's discrimination claim. On March 10, 2006, respondent deposited Lopez's settlement check into his CTA.

On March 10, 2006, following the deposit of Lopez's settlement check into his CTA, the balance in the CTA was \$58,606.32. Lopez was entitled to no less than \$14,600 of the \$54,896.27 in settlement funds.

On March 22, 2006, respondent wrote Lopez check number 1128 from his CTA in the amount of \$14,600. On April 20, 2006, when Lopez presented check number 1128 to the bank for payment, the balance in respondent's CTA was \$13,988.55. Respondent had intentionally or with gross negligence misappropriated Lopez's funds in the amount of \$611.45. On April 21, 2006, California Bank and Trust paid check number 1128 against insufficient funds.

b. Conclusions of Law

Count Two: Failing to Maintain Client Funds in Trust

Rule 4-100(A) provides that all funds received or held for the benefit of clients must be deposited in an identifiable bank account which is properly labeled as a client trust account. By not maintaining at least \$14,600 received on behalf of Lopez in his CTA, respondent failed to maintain client funds in a trust account, in willful violation of rule 4-100(A) of the Rules of Professional Conduct.

Count Three: Misappropriation

Section 6106 makes it a cause for disbarment or suspension to commit any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his or her relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not. Respondent willfully misappropriated \$611.45 in client funds in violation of section 6106. ““There is no doubt that the wilful misappropriation of a client’s funds involves moral turpitude. [Citations.]’ [Citations omitted.]” (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1033-1034.)

3. Count Four: Moral Turpitude-Issuing NSF Checks (Section 6106)

a. Facts

Between January 2006 and June 2006, respondent repeatedly issued paper and electronic checks drawn upon his CTA against insufficient funds, including:

Check Number	Date Issued	Check Amount	Date Presented	Account Balance ¹⁰
1128	03/22/06	\$14,600	04/21/06	-\$645.63
Electronic	05/18/06	\$800.00	05/18/06	\$349.37 ¹¹
1132	05/16/06	\$81.62	06/09/06	-\$98.77

¹⁰Based on the findings of fact in count 2, the term “account balance” refers to the balance in respondent’s CTA after each check was paid by California Bank and Trust.

¹¹Respondent maintained a balance of \$349.37 after California Bank and Trust paid his May 18, 2006 electronic check. Therefore, the court will not base culpability on this check.

Electronic	06/09/06	\$132.89	06/09/06	-\$231.66
Electronic	06/12/06	\$197.99	06/12/06	-\$275.14
1141	06/09/06	\$1076.33	06/13/06	-\$1158.48
Electronic	06/13/06	\$269.44	06/13/06	-\$1457.92
Electronic	06/15/06	\$132.80	06/15/06	-\$315.04
1140	06/02/06	\$40.00	06/16/06	-\$227.15

Respondent issued the checks set forth above when he knew, or was grossly negligent in not knowing, that there were insufficient funds in his CTA to pay them.

b. Conclusions of Law

Respondent willfully violated section 6106 by issuing eight paper and electronic checks against insufficient funds in his CTA between March 22, 2006 and June 15, 2006.

4. Count Five: Failure to Cooperate (*Section 6068, subdivision (i)*)

a. Facts

On May 6, 2006, the State Bar opened investigation number 06-O-12424 pursuant to a report from California Bank and Trust regarding insufficient funds in respondent's CTA (the May 6, 2006 reportable action). On August 14 and September 13, 2006, a State Bar investigator wrote to respondent regarding the May 6, 2006 reportable action. The investigator's letters requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in the May 6, 2006 reportable action.

The investigator's letters were placed in a sealed envelope correctly addressed to respondent at his official address. The letters were properly mailed by first class mail, postage prepaid, by depositing for collection by the U.S. Postal Service in the ordinary course of business. The U.S. Postal Service returned the investigator's letters as undeliverable.

On November 6, 2006, a State Bar investigator again wrote to respondent regarding the May 6, 2006 reportable action. The investigator's letter requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in the May 6, 2006 reportable action. The investigator's letter was placed in a sealed envelope correctly addressed to respondent

at his Tierrasanta address. The letter was properly mailed by first class mail, postage prepaid, by depositing for collection by the U.S. Postal Service in the ordinary course of business. The U.S. Postal Service did not return the investigator's letter as undeliverable or for any other reason. Respondent received the letter, but did not respond to it.

On March 7, 2007, a State Bar investigator called respondent. Respondent informed the investigator that his correct mailing address was his San Jose address. The investigator informed respondent that she would mail the August 14 and September 13, 2006 letters to him again. Respondent told the investigator he would respond to her letters.

On March 7, 2007, a State Bar investigator again wrote to respondent regarding the May 6, 2006 reportable action. The investigator's letter requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in the May 6, 2006 reportable action. The investigator enclosed copies of her August 14 and September 13, 2006 letters and placed the letters in a single sealed envelope correctly addressed to respondent at his San Jose address. The letters were properly mailed by first class mail, postage prepaid, by depositing for collection by the U.S. Postal Service in the ordinary course of business. The U.S. Postal Service did not return the investigator's letters as undeliverable or for any other reason. Respondent received the letters, but did not respond to them.

Respondent did not respond to any of the aforementioned State Bar letters regarding the May 6, 2006 reportable action or otherwise communicate with the State Bar investigator.

b. Conclusions of Law

The State Bar proved by clear and convincing evidence that respondent willfully violated section 6068, subdivision (i). Section 6068, subdivision (i), requires an attorney to cooperate with and participate in a State Bar disciplinary investigation or proceeding. Respondent willfully violated section 6068, subdivision (i), by failing to provide a written response to the allegations set forth in the State Bar's letters of November 6, 2006 and March 7, 2007 (enclosing copies of the August 14 and September 13, 2006 letters) regarding the investigation of the May 6, 2006 reportable action.

5. Count Six: Failure to Cooperate (*Section 6068, subdivision (i)*)

a. Facts

On July 10, 2006, the State Bar opened investigation number 06-O-13267 pursuant to a report from California Bank and Trust regarding insufficient funds in respondent's CTA (the July 10, 2006 reportable action). On August 17 and September 13, 2006, a State Bar investigator wrote to respondent regarding the July 10, 2006 reportable action. The investigator's letters requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in the July 10, 2006 reportable action. The investigator's letters were placed in a sealed envelope correctly addressed to respondent at his official address. The letters were properly mailed by first class mail, postage prepaid, by depositing for collection by the U.S. Postal Service in the ordinary course of business. The U.S. Postal Service returned the investigator's letters as undeliverable.

On November 6, 2006, a State Bar investigator again wrote to respondent regarding the July 10, 2006 reportable action. The investigator's letter requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in the July 10, 2006 reportable action. The investigator's letter was placed in a sealed envelope correctly addressed to respondent at his Tierrasanta address. The letter was properly mailed by first class mail, postage prepaid, by depositing for collection by the U.S. Postal Service in the ordinary course of business. The U.S. Postal Service did not return the investigator's letter as undeliverable or for any other reason. Respondent received the letter, but did not respond to it.

On March 7, 2007, a State Bar investigator called respondent. Respondent informed the investigator that his correct mailing address was the San Jose address. The investigator informed respondent that she would mail the August 17 and September 13, 2006 letters to him again. Respondent told the investigator he would respond to her letters.

On March 7, 2007, a State Bar investigator wrote to respondent regarding the July 10, 2006 reportable action. The investigator's letter requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in the July 10, 2006 reportable action. The investigator enclosed copies of her August 17 and September 13, 2006 letters and placed the

letters in a single sealed envelope correctly addressed to respondent at his San Jose address. The letters were properly mailed by first class mail, postage prepaid, by depositing for collection by the U.S. Postal Service in the ordinary course of business. The U.S. Postal Service did not return the investigator's letters as undeliverable or for any other reason. Respondent received the letters, but did not respond to them.

Respondent did not respond to any of the aforementioned State Bar letters regarding the July 10, 2006 reportable action or otherwise communicate with the State Bar investigator.

b. Conclusions of Law

Respondent willfully violated section 6068, subdivision (i), by failing to provide a written response to the allegations set forth in the State Bar's November 6, 2006 and March 7, 2007 letters (enclosing copies of the August 17 and September 13, 2006 letters) regarding the investigation of the July 10, 2006 reportable action.

C. Counts Seven through Eleven: The Vicino Matter

1. Facts

On September 26, 2004, Joseph Vicino (Vicino) was personally served with the summons and complaint in *Lorina and James Brown v. Joseph J. Vicino*, San Diego Superior Court Case No. GIE023561 (*Brown v. Vicino*). *Brown v. Vicino* was a real property dispute involving Vicino's home. On October 7, 2004, Vicino employed respondent and paid him \$3000 in advanced fees to defend Vicino's interests in *Brown v. Vicino*. During this same time period, Vicino provided respondent with a copy of the summons and complaint.

On October 22, 2004, respondent contacted the San Diego Superior Court and reserved a date to file a responsive pleading. Nevertheless, respondent did not file a responsive pleading on Vicino's behalf in *Brown v. Vicino*. On November 8, 2004, the court in *Brown v. Vicino* granted the Browns' request to enter default judgment against Vicino. Thereafter, on January 15, 2005, default judgment was entered against Vicino, and the Browns acquired title to Vicino's home.

On January 27, 2005, respondent filed a motion to set aside Vicino's default. On March 16, 2005, the court ruled that Vicino's default would be set aside on the condition that respondent or

Vicino pay \$5095 in attorneys' fees and costs to the Browns within 30 days of the court's ruling (the March 16, 2005 ruling). The court mailed a copy of the March 16, 2005 ruling to respondent. Respondent received the March 16, 2005 ruling.

Respondent did not inform Vicino of the March 16, 2005 ruling. Respondent did not pay the Browns' attorneys' fees and costs within 30 days of the March 16, 2005 ruling.

On April 20, 2005, the Browns filed an ex parte application to vacate the court's previous order setting aside Vicino's default on the basis that their attorneys' fees and costs had not been paid. On April 20, 2005, counsel for the Browns left respondent a voice mail message in which he provided respondent with notice of the ex parte hearing and faxed respondent a copy of the ex parte application and proposed order. Respondent received the voice mail message and a copy of the ex parte application and proposed order, but did not respond to the application. On April 21, 2005, the Browns' ex parte application was heard and the court vacated its order setting aside Vicino's default. Respondent did not attend the hearing.

On July 10, 2005, the Browns served Vicino with a summons and complaint in a separate unlawful detainer action entitled *Lorina and James Brown v. Joseph J. Vicino*, San Diego Superior Court Case No. UE016531 (the unlawful detainer action). On that same date, Vicino went to the courthouse to review the file pertaining to *Brown v. Vicino* and discovered that a default judgment had been entered against him.

Vicino immediately sent respondent e-mail messages and called respondent's office and left voice mail messages for him in which he asked respondent to contact him. In the messages, Vicino also told respondent that he wanted respondent to sign a substitution of attorney form so that Vicino could hire new counsel in *Brown v. Vicino*. Respondent received Vicino's e-mails and voice mails, but did not communicate with Vicino or sign a substitution of attorney form.

While representing Vicino in *Brown v. Vicino*, respondent did not inform Vicino of numerous developments including: (1) that respondent had failed to file a responsive pleading to the Browns' complaint; (2) that default judgment had been entered against Vicino; (3) that the Browns had acquired title to Vicino's residential property as a result of the default judgment; (4) that respondent

had moved set aside the default; (5) that the motion to set aside the default had been granted on the condition that respondent or Vicino pay the Browns' attorneys fees and costs within 30 days of the court's order vacating Vicino's default; (6) that respondent did not pay the Browns' attorneys fees and costs within 30 days of the court's order; (7) that the court had granted the Browns' ex parte application to vacate the court's previous order setting aside Vicino's default judgment; (8) that respondent did not file any documents in response to the Browns' ex parte application; and (9) that respondent did not appear at the hearing on the Browns' ex parte application to vacate the court's previous order setting aside Vicino's default judgment.

On July 13, 2005, Vicino employed Guy Ricciardulli (Ricciardulli) to represent him in connection with *Brown v. Vicino*. Between July 13 and July 20, 2005, Ricciardulli called respondent's office several times and left messages on respondent's voice mail in which he asked respondent to sign a substitution of attorney form and provide Ricciardulli or Vicino with a copy of Vicino's file in *Brown v. Vicino*. Respondent received the messages, but did not provide Ricciardulli or Vicino with a copy of Vicino's file and did not sign a substitution of attorney form.

On July 20, 2005, Ricciardulli filed an ex parte request to substitute into *Brown v. Vicino* and the court granted his request.

Vicino terminated respondent's services as of July 10, 2005, the date Vicino informed respondent he wanted respondent to sign a substitution of attorney form so that he could hire new counsel. Respondent did not provide Vicino with services of any value and did not earn any portion of the \$3000 in legal fees advanced to him by Vicino.¹²

On May 30, 2006, the State Bar opened investigation number 06-O-12591 pursuant to a complaint made against respondent by Vicino (the Vicino complaint). On September 28, 2006, a State Bar investigator wrote to respondent regarding the Vicino complaint. The investigator's letter requested that respondent respond in writing to specified allegations of misconduct being

¹² As of October 12, 2007, respondent still had not refunded any portion of the unearned fees to Vicino. There is no indication in the record that respondent has refunded any portion of the unearned fees to Vicino since October 12, 2007.

investigated by the State Bar in the Vicino complaint. The investigator's letter was placed in a sealed envelope correctly addressed to respondent at his official address. The letter was properly mailed by first class mail, postage prepaid, by depositing for collection by the U.S. Postal Service in the ordinary course of business. The U.S. Postal Service returned the investigator's letter as undeliverable.

On March 7, 2007, a State Bar investigator called respondent. Respondent informed the investigator that his correct mailing address is the San Jose address. The investigator informed respondent that she would mail the September 28, 2006 letter to him again. Respondent told the investigator he would respond to her letter.

On March 7, 2007, a State Bar investigator wrote to respondent regarding the Vicino complaint. The investigator's letter requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in the Vicino complaint. The investigator enclosed a copy of her September 28, 2006 letter and placed the letters in a single sealed envelope correctly addressed to respondent at his San Jose address. The letters were properly mailed by first class mail, postage prepaid, by depositing for collection by the U.S. Postal Service in the ordinary course of business. The U.S. Postal Service did not return the investigator's letters as undeliverable or for any other reason. Respondent received the letters, but did not respond to them.

Respondent did not respond to any of the aforementioned State Bar letters regarding the Vicino complaint or otherwise communicate with the State Bar investigator.

2. Conclusions of Law

a. Count Seven: Failure to Perform (*Rule 3-110(A)*)

Rule 3-110(A) provides that a member must not intentionally, recklessly or repeatedly fail to perform legal services with competence. Respondent intentionally, recklessly and repeatedly failed to perform legal services with competence, in willful violation of rule 3-110(A), by failing to file a responsive pleading on Vicino's behalf in *Brown v. Vicino*, by failing to pay the Browns' attorneys' fees and costs within 30 days of the court's order setting aside Vicino's default in *Brown v. Vicino*, by failing to respond to the Browns' ex parte application to vacate the court's previous

order setting aside Vicino's default in *Brown v. Vicino*, and by failing to appear at the hearing on the ex parte application in *Brown v. Vicino*.

b. Count Eight: Failure to Communicate (*Section 6068, subdivision (m)*)

Section 6068, subdivision (m), provides that it is the duty of an attorney to respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

Respondent willfully violated section 6068, subdivision (m), by failing to keep his client reasonably informed of the following significant developments in *Brown v. Vicino*: (1) that respondent had failed to file a responsive pleading to the Browns' complaint; (2) that default judgment had been entered against Vicino; (3) that the Browns had acquired title to Vicino's residential property as a result of the default judgment; (4) that respondent had moved set aside the default; (5) that the motion to set aside the default had been granted on the condition that respondent or Vicino pay the Browns' attorneys fees and costs within 30 days of the court's order vacating Vicino's default; (6) that respondent did not pay the Browns' attorneys fees and costs within 30 days of the court's order; (7) that the court had granted the Browns' ex parte application to vacate the court's previous order setting aside Vicino's default judgment; (8) that respondent did not file any documents in response to the Browns' ex parte application; and (9) that respondent did not appear at the hearing on the Browns' ex parte application to vacate the court's previous order setting aside Vicino's default judgment.

c. Count Nine: Failure to Refund an Unearned Fee (*Rule 3-700(D)(2)*)

Rule 3-700(D)(2) requires an attorney whose employment has been terminated to promptly refund any part of a fee paid in advance that has not been earned. By failing to promptly refund, upon termination of employment, the \$3,000 in advanced fees paid to him by Vicino which respondent did not earn, respondent failed to refund unearned fees to his client, in willful violation of rule 3-700(D)(2).

d. Count Ten: Failure to Release File (*Rule 3-700(D)(1)*)

Rule 3-700(D)(1) requires an attorney whose employment has been terminated to promptly

release to the client, at the client's request, all client papers and property, subject to any protective order or non-disclosure agreement. This includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports and other items reasonably necessary to the client's representation, whether the client has paid for them or not.

By failing to promptly provide Ricciardulli or Vicino with a copy of Vicino's file, respondent failed to release promptly, upon termination of employment, to the client, at the request of the client, all the client papers and property, in willful violation of rule 3-700(D)(1).

e. Count Eleven: Failure to Cooperate (*Section 6068, subdivision (i)*)

Respondent willfully violated section 6068, subdivision (i), by failing to provide a written response to the allegations set forth in the State Bar's March 7, 2007 letter (enclosing a copy of the September 28, 2006 letter) regarding the investigation of the Vicino complaint.

D. Counts Twelve and Thirteen: The Heath Matter

1. Facts

On April 3, 2003, Carol Heath (Heath) hired respondent to represent her in a wrongful termination claim against her former employer, UPS. Heath paid respondent \$1000 in advanced fees. On February 20, 2004, respondent filed a lawsuit on behalf of Heath in the matter entitled *Health Carol, et al. v. United Parcel Service Inc., et al.*,¹³ San Diego Superior Court Case No. GIC 825955 (Heath's case).

Respondent settled Heath's case in April 2005. In August 2005, following the distribution of Heath's settlement funds, respondent's employment with Heath terminated.

In October 2005, Heath left a message on respondent's voice mail requesting a copy of her file, including her settlement agreement. From October 2005 through December 2005, Heath called respondent twice a month and left him voice mail messages in which she requested her file. Respondent received Heath's messages, but did not communicate with Heath or return her file.

In March 2006, Heath went to respondent's office. Respondent was not present, so Heath left

¹³Although there appears to be a typographical error here, this is how the caption of the lawsuit appears in the NDC.

a note for respondent with his receptionist in which she requested that respondent send her a copy of her file, as well as a copy of the settlement agreement in her case. Respondent received Heath's note, but did not communicate with Heath, return her file, or provide her with a copy of her settlement agreement.

In June 2006, Heath sent a certified letter to respondent's office in which she requested her file. The letter was signed for by a member of respondent's staff. Respondent received Heath's letter, but did not communicate with Heath or return her file. At no time did respondent provide Heath with her file.

On June 9, 2006, the State Bar opened investigation number 06-O-12711 pursuant to a complaint made against respondent by Heath (the Heath complaint). On September 20, 2006, a State Bar investigator wrote to respondent regarding the Heath complaint. The investigator's letter requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in the Heath complaint. The investigator's letter was placed in a sealed envelope correctly addressed to respondent at his official address. The letter was properly mailed by first class mail, postage prepaid, by depositing for collection by the U.S. Postal Service in the ordinary course of business. The U.S. Postal Service returned the investigator's letter as undeliverable.

On November 6, 2006, a State Bar investigator again wrote to respondent regarding the Heath complaint. The investigator's letter requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in the Heath complaint. The investigator's letter was placed in a sealed envelope correctly addressed to respondent at his Tierrasanta address. The letter was properly mailed by first class mail, postage prepaid, by depositing for collection by the U.S. Postal Service in the ordinary course of business. The U.S. Postal Service did not return the investigator's letter as undeliverable or for any other reason. Respondent received the letter, but did not respond to it.

On March 7, 2007, a State Bar investigator called respondent. Respondent informed the investigator that his correct mailing address was the San Jose address. The investigator informed respondent that she would mail the September 20, 2006 letter to him again. Respondent told the

investigator he would respond to her letter.

On March 7, 2007, a State Bar investigator wrote to respondent regarding the Heath complaint. The investigator's letter requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in the Heath complaint. The investigator enclosed a copy of her September 20, 2006 letter and placed the letters in a single sealed envelope correctly addressed to respondent at the San Jose address. The letters were properly mailed by first class mail, postage prepaid, by depositing for collection by the U.S. Postal Service in the ordinary course of business. The U.S. Postal Service did not return the investigator's letters as undeliverable or for any other reason. Respondent received the letters, but did not respond to them.

Respondent did not respond to any of the aforementioned State Bar letters regarding the Heath complaint or otherwise communicate with the State Bar investigator.

2. Conclusions of Law

a. Count Twelve: Failure to Release File (*Rule 3-700(D)(1)*)

By failing to provide Heath with a copy of her file, respondent failed, upon termination of employment, to release promptly to a client, at the request of the client, all the client papers, in willful violation of rule 3-700(D)(1).

b. Count Thirteen: Failure to Cooperate (*Section 6068, subdivision (i)*)

Respondent willfully violated section 6068, subdivision (i), by failing to provide a written response to the allegations set forth in the State Bar's November 6, 2006 and March 7, 2007 letters (enclosing a copy of the September 20, 2006 letter) regarding the investigation of the Heath complaint.

E. Counts Fourteen through Seventeen: Unauthorized Practice of Law

1. Facts

On May 17, 2006, the State Bar Court filed an order entering respondent's default in Case Number 05-C-04139 (the order). That same day, the State Bar Court properly served respondent with a copy of the order at his official address, by certified mail, return receipt requested. Thereafter, the State Bar Court received, from the U.S. Postal Service, the return receipt dated May 19, 2006. The receipt was signed by an individual named Paul Zelechowski. Respondent received the order.

As a result of the order, respondent was placed on involuntary inactive enrollment on May 20, 2006, pursuant to section 6007, subdivision (e)(1).

In 2006, respondent represented Intra Network Securities and Dennis Pearson (Pearson¹⁴) in the matter entitled *Cassandra King v. Intra Network Securities, Dennis Pearson, et al.*, San Diego Superior Court Case No. GIC 849375. On May 25, 2006, while respondent was not entitled to practice law, he signed, as Pearson's attorney of record, Pearson's answer to Cassandra King's (King) complaint, as well as Pearson's cross-complaint against King. On that same date, respondent caused both of those documents to be filed with the court.

At the time respondent signed and filed Pearson's answer and cross-complaint, he knew that he was not entitled to practice law and thereby misrepresented his membership status to the court and opposing counsel. On August 11, 2006, the court ordered both Pearson's answer to the complaint and Pearson's cross-complaint stricken because respondent was not an active member of the State Bar at the time he signed them.

On August 18, 2006, the State Bar opened investigation number 06-O-13991 pursuant to a complaint made against respondent by the Honorable William R. Nevitt (the Nevitt complaint). On December 7, 2006, a State Bar investigator wrote to respondent regarding the Nevitt complaint. The investigator's letter requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in the Nevitt complaint. The investigator's letter was placed in a sealed envelope correctly addressed to respondent at his official address. The letter was properly mailed by first class mail, postage prepaid, by depositing for collection by the U.S. Postal Service in the ordinary course of business. The U.S. Postal Service returned the investigator's letter as undeliverable.

That same day, a copy of this letter was also properly mailed to respondent at his Tierrasanta address. The U.S. Postal Service did not return said copy as undeliverable or for any other reason. Respondent received the letter, but did not respond to it.

On March 7, 2007, a State Bar investigator called respondent. Respondent informed the

¹⁴All subsequent references to Pearson refer collectively to Intra Network Securities and Dennis Pearson.

investigator that his correct mailing address was the San Jose address. The investigator informed respondent that she would mail the December 7, 2006 letter to respondent again. Respondent told the investigator he would respond to her letter.

On March 7, 2007, a State Bar investigator wrote to respondent regarding the Nevitt complaint. The investigator's letter requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in the Nevitt complaint. The investigator enclosed a copy of her December 7, 2006 letter and placed both letters in a single sealed envelope correctly addressed to respondent at the San Jose address. The letters were properly mailed by first class mail, postage prepaid, by depositing for collection by the U.S. Postal Service in the ordinary course of business. The U.S. Postal Service did not return the investigator's letters as undeliverable or for any other reason. Respondent received the letters, but did not respond to them.

Respondent did not respond to any of the State Bar letters regarding the Nevitt complaint or otherwise communicate with the State Bar investigator.

2. Conclusions of Law

a. Count Fourteen: Comply With All Laws (*Section 6068, subdivision (a)*)

Section 6068, subdivision (a), provides that an attorney has a duty to support the laws of the United States and of this state. Section 6125 prohibits the practice of law by anyone other than an active attorney and section 6126 prohibits holding oneself out as entitled to practice law by anyone other than an active attorney.

The court finds, by clear and convincing evidence, that by signing and filing an answer to King's complaint and a cross-complaint as Pearson's attorney of record, respondent held himself out as entitled to practice law and actually practiced law while he was not entitled to practice law, in willful violation of Business and Professions Code sections 6125 and 6126, and thereby failed to support the laws of the State of California in violation of Business and Professions Code section 6068, subdivision (a).

b. Count Fifteen: Engaging in the Unauthorized Practice of Law (*Section 6106*)

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption. The unauthorized practice of law can involve moral turpitude. (*Hightower*

v. *State Bar* (1983) 34 Cal.3d 150, 157.)

By knowingly holding himself out as entitled to practice law and by practicing law when he was not entitled to do so, respondent committed acts involving moral turpitude, dishonesty or corruption, in willful violation of Business and Professions Code section 6106.

c. Count Sixteen: Misrepresentation (*Section 6106*)

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption. “Acts of moral turpitude include concealment as well as affirmative misrepresentations. [Citations.]” (*In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798, 808.)

By knowingly holding himself out as entitled to practice law and by practicing law before the court when he was not entitled to do so, respondent made an affirmative misrepresentation to the court and thereby committed an act involving moral turpitude, dishonesty or corruption, in willful violation of Business and Professions Code section 6106.¹⁵

d. Count Seventeen: Failure to Cooperate (*Section 6068, subdivision (i)*)

Respondent willfully violated section 6068, subdivision (i), by failing to provide a written response to the allegations set forth in the State Bar's December 7, 2006 and March 7, 2007 letters (enclosing a copy of the December 7, 2006 letter) regarding the investigation of the Nevitt complaint.

F. Count Eighteen: Failure to Update Membership Address (*Section 6068, subdivision (j)*)

1. Facts

As noted above, respondent did not maintain a current membership address with the State Bar from August 2006 through March 2007.

2. Conclusions of Law

The State Bar proved by clear and convincing evidence that respondent willfully violated section 6068, subdivision (j). Section 6068, subdivision (j), provides that it is the duty of an attorney to comply with the requirements of section 6002.1. Section 6002.1 requires that members maintain, on the official membership records of the State Bar, their current office address and telephone

¹⁵Counts 15 and 16 arise out of the same misconduct. Therefore, the court considers these two counts as one act of moral turpitude for purposes of determining discipline.

number;¹⁶ and in the event that a member's address or office telephone information changes, the member must notify the membership records office of the State Bar within 30 days. Respondent willfully violated section 6068, subdivision (j), by changing his address in or before August of 2006, and failing to notify the membership records office of the State Bar within 30 days of the change, thereby failing to maintain a current address on the State Bar's official membership records.

IV. Mitigating and Aggravating Circumstances

A. Mitigation

Respondent bears the burden of establishing mitigation by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct,¹⁷ std. 1.2(e).) Since respondent did not participate in these proceedings, the court has been provided no basis for finding mitigating factors and none can be gleaned from the record.

B. Aggravation

It is the State Bar's burden to establish aggravating circumstances by clear and convincing evidence. (Std 1.2(b).) The court finds several aggravating factors:

1. Prior Record of Discipline

Respondent has a prior record of discipline. (Std. 1.2(b)(i).) On September 11, 2007, the California Supreme Court, in another default matter, issued an order (S154377) suspending respondent from the practice of law for four years, staying execution of the suspension, and actually suspending respondent from the practice of law for six months and until: (1) respondent makes restitution, (2) respondent pays his court ordered sanctions, and (3) the State Bar Court grants a motion to terminate his actual suspension pursuant to rule 205 of the Rules of Procedure of the State Bar of California. This case involved nine acts of misconduct in four separate matters. Respondent's misconduct included improperly withdrawing from representation, failing to perform, failing to refund an unearned fee, failing to obey a court order, failing to report sanctions to the State Bar, failing to release a file (two counts), and failing to cooperate with a State Bar investigation (two

¹⁶If the member does not maintain an office, then they are required to list the address to be used for State Bar purposes.

¹⁷Future references to standard or std. are to this source.

counts). In aggravation, respondent committed multiple acts of misconduct; he failed to cooperate in the disciplinary proceedings; his misconduct significantly harmed two of his clients; and he demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. The court found no mitigation.

2. Harm

The court also finds in aggravation that respondent's misconduct caused significant harm to at least one of his clients. (Std. 1.2(b)(iv).) As a result of respondent's misconduct, Vicino had a default judgment entered against him which then resulted in an unlawful detainer action. Additionally, Vicino suffered financial harm as a result of respondent's failure to refund \$3000 in unearned attorney's fees.

3. Respondent's Failure to Participate

Respondent's failure to participate in these proceedings prior to the entry of default is also an aggravating factor. (Std. 1.2(b)(vi).) Although respondent was fully aware of this matter and even attended the Initial Status Conference, he chose not to participate further in the proceedings and provided the court with no explanation for his absence.

4. Multiple Acts of Misconduct

Respondent's multiple acts of misconduct are an aggravating factor. (Std. 1.2(b)(ii).)

V. Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed must be the most severe of the applicable sanctions. (Std. 1.6(a).)

Several standards apply in this matter, including standards 2.2(a), 2.3, and 2.6. The most

severe sanction is found in standard 2.2(a) which recommends disbarment for willful misappropriation of entrusted funds unless the amount misappropriated is insignificantly small or unless the most compelling mitigating circumstances clearly predominate, in which case the minimum discipline recommended is one year actual suspension.

Due to respondent's prior record of discipline, standard 1.7(a) is also applicable. Standard 1.7(a) provides that, if a member is found culpable of professional misconduct in any proceeding in which discipline may be imposed and the member has a record of one prior imposition of discipline, the degree of discipline imposed in the current proceeding must be greater than that imposed in the prior proceeding unless the prior discipline imposed was so remote in time to the current proceeding and the offense for which it was imposed was so minimal in severity that imposing greater discipline in the current proceeding would be manifestly unjust.

The Supreme Court gives the standards "great weight" and will reject a recommendation consistent with the standards only where the court entertains "grave doubts" as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) However, the standards are not mandatory; they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

The State Bar argues that respondent should be disbarred. In support of its position, the State Bar cites, among other cases, *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563. The court finds *Taylor* to be particularly instructive.

Although *Taylor* did not involve misappropriation, it evidences many similarities to the present case. In *Taylor*, the respondent accepted representation of three separate clients while he was suspended from the practice of law for failing to pay membership fees. Additionally, in each of the three matters the respondent was found culpable of failing to properly communicate with his clients and failing to refund unearned fees. In one of the three client matters, the respondent also committed moral turpitude by of having his client sign a blank discovery verification form. In aggravation, the respondent had one prior record of discipline consisting of a one year stayed suspension, with two years' probation, and six-months' actual suspension. Additionally, the respondent's misconduct

caused harm to his clients. No mitigation was found. In recommending disbarment, the Review Department paid particular attention to the respondent's failure to participate in the proceedings, noting that he "displayed total indifference and lack of remorse by ignoring both his present and past discipline proceedings. Respondent's lack of participation . . . indicates that far more severe discipline is required to achieve the purposes of attorney discipline set forth in standard 1.3 (protection of the public, courts and legal profession as well as rehabilitation in the proper case)." (*Id.* at p. 581.)

As noted above, the present case shares many characteristics with *Taylor*. Both cases involve multiple counts of misconduct affecting several clients. Both cases proceeded by default. Both respondents had similar prior records of discipline. Both cases involved significant client harm. And, while the present case does not include as many counts involving the unauthorized practice of law, it contains equally, if not more egregious misconduct in the form of misappropriation and client trust account violations.

Therefore, based on these facts, the court finds that respondent, like the respondent in *Taylor*, does not appear to be a good candidate for suspension and/or probation. Respondent's misconduct and his inaction during this proceeding reflect his "disdain and contempt for the orderly process and rule of law and clearly demonstrate that the risk of future misconduct is great." (*Id.*) After weighing the evidence, including the factors in aggravation, the court agrees with the State Bar's recommendation that respondent should be disbarred.

VI. Recommended Discipline

The court recommends that respondent **JAMES R. MILLER** be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys in this state.

The court recommends that respondent be ordered to comply with California Rules of Court, rule 9.20, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

It is also recommended that respondent be ordered to make restitution to Joseph Vicino in the amount of \$3000 plus 10% interest per annum from October 7, 2004 (or to the Client Security Fund to the extent of any payment from the fund to Vicino, plus interest and costs, in accordance

with Business and Professions Code section 6140.5).

VII. Order of Inactive Enrollment

In accordance with Business and Professions Code section 6007, subdivision (c)(4), it is ordered that respondent be involuntarily enrolled as an inactive member of the State Bar of California effective three days after service of this decision and order by mail (Rules Proc. of State Bar, rule 220(c)).

VIII. Costs

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: May __, 2008.

RICHARD A. HONN
Judge of the State Bar Court